

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge found claimant entitled to permanent partial general disability benefits based upon a twenty-one percent (21%) work disability. The Administrative Law Judge gave no weight to claimant's loss of ability to perform work in the open labor market. The claimant requests the Appeals Board review the finding of the nature and extent of disability. That is the sole issue now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

For the reasons expressed below, claimant is entitled to receive benefits based upon a twenty-eight percent (28%) permanent partial general disability as a result of his work-related injury of February 25, 1991.

At the time of regular hearing, claimant was twenty-eight (28) years old and had worked for the respondent for approximately eight (8) years. On February 25, 1991, claimant sustained a work-related back injury that resulted in laminectomy and fusion between the L4-S1 intervertebral spaces. After recovering from his surgery in November 1991, claimant returned to work for the respondent in November 1992.

At the time of his work-related accident, claimant was a working supervisor on the respondent's kill floor. When claimant returned to work after surgery, respondent had changed the plant operation from a lamb slaughterhouse to cooking and food preparation. Claimant returned to work for respondent as a supervisor of the cooking floor which is a much less physically demanding job than his previous position.

Claimant's average weekly wage for the date of accident is \$461.56. In his present position, claimant earns \$365.38 per week and, therefore, has sustained a twenty-one percent (21%) actual wage loss.

Two (2) physicians testified regarding the nature and extent of claimant's injuries. Board-certified orthopedic physician, Robert L. Eyster, M.D., testified claimant has sustained a twelve percent (12%) permanent partial impairment of function to the body as a whole as a result of his work-related injury. Dr. Eyster, who treated claimant and performed the spinal surgery, believes claimant has early stenosis at the L3-L4 intervertebral level that is related to his two-level fusion. Additionally, because of the fusion, claimant is at greater risk for injury at the L3-L4 level. Although he believes claimant may lift up to sixty pounds (60 lbs.) on occasion, Dr. Eyster believes claimant should limit his maximum repetitive lifting to thirty-five pounds (35 lbs.) and severely limit bending and twisting motions. In fact, the doctor believes claimant should not do any bending when not required and limit these motions to a minimum. Dr. Eyster also testified he would advise claimant to attempt to limit his lifting to a forty pound (40 lb.) maximum, if possible.

The testimony of Wichita physician, Ernest R. Schlachter, M.D., was also presented. Dr. Schlachter diagnosed claimant's condition as two-level disc disease, previously operated with spinal fusion. Dr. Schlachter believes claimant has sustained a twenty percent (20%) permanent partial impairment of function as a result of his work-related injury and should observe the restrictions and limitations of no repetitive lifting greater than twenty-five pounds (25 lbs.), no single lifting greater than thirty-five pounds (35 lbs.), and no repetitive bending, twisting, or working in awkward positions. The doctor believes claimant should ideally work in a job where he can sit part time and stand part time. Dr. Schlachter evaluated claimant in March 1993, and at that time found ongoing symptomatology in his left leg. This doctor emphatically disagrees with Dr. Eyster's sixty pound (60 lb.) lifting restriction.

Claimant was evaluated by both labor market experts, Jerry D. Hardin and Karen Crist Terrill, for purposes of determining loss of ability to perform work in the open labor market and loss of ability to earn comparable wage. Mr. Hardin testified claimant has lost twenty-five to thirty percent (25-30%) of his ability to perform work in the open labor market utilizing the restrictions of Dr. Eyster and sixty to sixty-five percent (60-65%) of the same ability utilizing the restrictions of Dr. Schlachter. On the other hand, Ms. Terrill testified claimant has lost twelve percent (12%) of his ability to perform work in the open labor market using Dr. Eyster's restrictions and thirty-nine percent (39%) using Dr. Schlachter's restrictions. Both experts testified claimant's current loss of wage is twenty-one percent (21%) based upon his actual pre-injury and post-injury earnings.

Under K.S.A. 1990 Supp. 44-510e, claimant is entitled permanent partial general disability benefits for a nonscheduled injury. The statute provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

The Appeals Board finds claimant's actual wage loss is a reasonable measure of his loss of ability to earn a comparable wage. Therefore, twenty-one percent (21%) will be considered as claimant's loss of ability to earn comparable wage as required by the above-cited statute. The Appeals Board averages the opinions of Mr. Hardin and Ms. Terrill and finds claimant has lost thirty-five percent (35%) of his ability to perform work in the open labor market as a result of his work-related injury and two-level fusion and laminectomy.

The Appeals Board is not required to equally weigh loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this instance, there is no compelling reason to give either factor greater weight. Therefore, the Appeals Board averages both losses and finds claimant has sustained a twenty-eight percent (28%) permanent partial general disability.

The respondent argues claimant's loss of wage should be given more weight than the loss of ability to perform work in the open labor market. However, due to the severity

of claimant's injury, the significant resulting impairment and significant wage loss, the Appeals Board believes an average of the losses to be more equitable.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated July 18, 1994, should be, and hereby is, modified as follows:

An award of compensation is hereby made in accordance with the above findings in favor of the claimant, Danny McCartney, and against the respondent, Monfort, Inc., and its insurance carrier, Home Insurance Company, for an accidental injury which occurred on February 25, 1991, and based upon an average weekly wage of \$461.56, for 51.86 weeks of temporary total disability compensation at the rate of \$278.00 per week or \$14,417.08, followed by 363.14 weeks of permanent partial general disability compensation at the rate of \$86.16 per week or \$31,288.14 for a twenty-eight percent (28%) work disability, making a total award of \$45,705.22. As of March 21, 1995, there is due and owing claimant 51.86 weeks of temporary total disability compensation at the rate of \$278.00 per week or \$14,417.08, followed by 160.28 weeks of permanent partial disability compensation at the rate of \$86.16 per week in the sum of \$13,809.72, for a total of \$28,226.80 which is ordered paid in one (1) lump sum less any amounts previously paid. The remaining balance of \$17,478.42 is to be paid for 202.86 weeks at the rate of \$86.16 per week, until fully paid or further order of the Director.

The orders of the Administrative Law Judge that are not inconsistent with the above are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Stephen J. Jones, Wichita, KS
John D. Clark, Administrative Law Judge
George Gomez, Director